



The Comptroller General  
of the United States

Washington, D.C. 20548

Goodrich

## Decision

Matter of: The B.F. Goodrich Company

File: B-230674

Date: May 18, 1988

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### DIGEST

1. Where protester knew of alleged protest basis, that preaward survey of its plant was limited to certain items offered and a revised best and final offer was subsequently requested, thus allegedly leading to an auction, protest is untimely since protester waited more than 10 working days to learn that similar allegedly improper action was taken with respect to its competitor, before filing a protest.
2. The fact that a preaward survey can in a particular case give rise to the inference that an offeror's price is not low in relation to that of another offeror, does not mean that such necessary action on the part of the government constitutes an auction per se.
3. The fact that the agency did not state a common cutoff date for best and final offers does not require corrective action where there is no evidence of disclosure of information during the course of the competitive process.

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### DECISION

The B.F. Goodrich Company protests the award of contracts under request for proposals (RFP) No. FCNH-F9-2048-N, issued by the General Services Administration (GSA) for FSC Class 7220, vinyl tile resin, fire retardant, floor matting. Goodrich objects to GSA's conduct of the procurement which Goodrich alleges was tantamount to an improper auction. Goodrich also argues that GSA has improperly accepted a late best and final offer (BAFO) from the Biltrite Corporation.

Subsequent to filing this protest, Goodrich filed a complaint in the United States District Court for the Northern District of Ohio, Eastern Division, requesting a temporary restraining order and preliminary injunction to stay the performance of Biltrite's contract. On April 22, the court issued a consent order in which it requested our decision.

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The court also stated that within 10 days following receipt of the General Accounting Office decision on the protest, and provided that defendants have met any obligations imposed upon them by the court's consent order, Goodrich shall dismiss its action with prejudice. Although we believe the protest was untimely filed and, therefore, normally for dismissal, we have nevertheless considered the merits of the protest because of the courts involvement. 4 C.F.R. § 21.9 (1988).

We deny the protest.

The procurement involves a 2-year requirements contract for two items of floor matting for three geographical zones. Award is to be made on an item by item basis for each zone. Amendment No. 1 of the RFP listed estimated annual quantities for each item number and zone. The initial closing date was on October 27, 1987. Subsequent to closing, the contracting officer determined it necessary to notify all offerors of expensive testing requirements that previous contractors had improperly performed. She informed them of the testing requirements while simultaneously requesting best and final offers (BAFOs). BAFOs were received by November 23, 1987. After receipt of the BAFOs, preaward surveys were conducted on Biltrite and Goodrich. The surveys were completed on December 15 and 18, respectively, and both offerors were recommended for awards. Subsequently, GSA requested a second round of BAFOs because the contracting officer became aware, in early January 1988, that both the RFP and amendment No. 1 misstated the government's requirements. The estimated requirements had been improperly listed as annual requirements. In fact, the listed requirements represented the estimated requirements over the 2-year life of the contract so the contracting officer informed offerors of this and requested a second round of BAFOs. Awards were made to Biltrite and Goodrich in March 1988, for those items and zones in which they were low. Biltrite was awarded a contract for all zones of item 1 and zones 1 and 3 of item 2, and Goodrich was awarded a contract under item 2, zone 2.

Goodrich contends that since the preaward survey of Goodrich's production facilities was limited in scope to production under zone 2, items 1 and 3, GSA "tipped its hand" and revealed to Goodrich that it was the low offeror on those items. Goodrich states that on January 12, 1988, it met with the contracting officer and expressed its concern about the integrity of the procurement since the manner in which the plant audit was conducted led Goodrich to surmise that GSA was "tipping its hand" as to the identity of the apparent low offerors after the first BAFOs had been received. Goodrich says it expressed its concern that

audits of Goodrich's competition, if performed in the same manner and limited scope as Goodrich's plant audit was performed, would allow those competitors to learn, contrary to regulations, that they were not the apparent low offerors with respect to various products. Goodrich states that its position was that the integrity of the procurement process could be preserved only by conducting audits of all products included in any individual offeror's original proposal to GSA and the contracting officer was asked whether Goodrich's competitor's had been audited in the same way Goodrich had been audited. Goodrich contends that at that time the contracting officer did not advise Goodrich how its competitors were audited. Goodrich states that on that same day, because of its concerns that an improper auction was being conducted, Goodrich revised its BAFO, reducing its prices in order to preserve its prospects of receiving an award.

Our Bid Protest Regulations require that protests shall be filed not later than 10 working days after the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1988). Goodrich's protest, that GSA's action was tantamount to an auction, is based on its knowledge of the conduct of the preaward survey followed by a second request for BAFOs.

We agree with GSA that Goodrich knew, as of January 12, its basis of protest, that its preaward survey was focused on certain items and zones it quoted and GSA had requested a second round of BAFOs. At that time, Goodrich voiced its concern of an auction to GSA. Further, as a reaction to its knowledge, Goodrich reduced its prices. In other words, although Goodrich had not been specifically told that its competitors were similarly audited, Goodrich itself was responding to the alleged signal of an improper auction. With this knowledge Goodrich should have protested GSA's actions within 10 working days.

Turning to the merits, we note Goodrich contends that by conducting Biltrite's plant audit in the same fashion as it had conducted Goodrich's plant audit, GSA "tipped its hand" by giving Biltrite information to determine the relative price standing of its offer as against its competitor's offer. Goodrich contends that by selectively auditing Biltrite, Biltrite would have known that Goodrich was competing in this procurement. Goodrich states it had not competed for this type of purchase before and its entry into the competition was treated by Goodrich as a trade secret which GSA, by its subsequent plant audits, revealed to Biltrite to Goodrich's prejudice. Goodrich argues that, in the circumstances, awards should be based upon the offerors' standings after the first BAFO.

Goodrich's allegations are not supported by the record. First, Goodrich erroneously assumes it was Biltrite's only competitor. Secondly, Goodrich does not contend that GSA actually informed Biltrite that Goodrich specifically was in the competition. Goodrich merely speculates that Biltrite's preaward survey provided Biltrite with this information. We have held that although it is possible that the mere institution of a preaward survey can, in a particular case, give rise to the inference that an offeror's price is not low in relation to that of another offeror, we do not believe that such necessary action on the part of the government constitutes an auction per se. 48 Comp. Gen. 323 (1968). It is clear from the record here that neither offeror knew whether and to what extent its possible competition was being audited until after awards were made. See Omni-Wave Electronics Corp., B-188370, Apr. 28, 1977, 77-1 CPD ¶ 291, in which the protester contended that the notification that a preaward survey would be performed prior to calling for BAFOs revealed the relative positions of the offerors and amounted to an auction. In that case, the protester believed that if other offerors were aware that a preaward survey would be performed on it, those offerors were afforded an opportunity to lower their prices in submission of their BAFOs. In Omni-Wave, we followed our decision in 48 Comp. Gen. 323, supra, and held that the mere notification that a preaward survey would be performed is not per se a proscribed auction. Both in this case and in Omni-Wave, no offeror knew that a preaward survey would be performed on any other offeror and each offeror was only aware of the facts relative to its own particular circumstances.

Finally, we stated in Omni-Wave that even if an offeror had substantially lowered its price between its initial proposal and its BAFO, this does not indicate the existence of a price leak since it is not uncommon for an offeror to withhold its lowest price until BAFOs are submitted. We think the same rationale applies where the submission of more than one BAFO is involved. Although the preaward survey may have been, perhaps, ill-timed, because of the necessity to call for second BAFOs, this fact does not afford a basis for overturning the resulting contract since such surveys may be taken of any prospective awardees, not just the low offeror. B-173536, Oct. 22, 1971.

Subsequent to receiving GSA's report on its protest, Goodrich also protested the alleged late submission of Biltrite's BAFO on January 15, 3 days after Goodrich submitted its BAFO on January 12. GSA states that revised BAFOs were requested orally and the contract files do not contain any writings establishing a cut-off date for the receipt of revised BAFOs.

The contracting officer states that, sometime in early January 1988, she notified offerors by telephone of the error in estimated quantities. She states that during these conversations she advised offerors that revised offers could be submitted due to the change in estimated quantities. By letter dated January 7, Goodrich acknowledged the change in estimated quantities.

During the January 12 meeting Goodrich requested with the contracting officer, the contracting officer again advised Goodrich it could submit a revised offer based on the change in requirements. GSA states, however, that Goodrich was given no deadline to submit a revised BAFO, although Goodrich did submit its revised BAFO later that day. Biltrite states that on January 15, it was requested by the contracting officer to submit a revised BAFO as soon as possible because of the requirements change. Biltrite submitted its revised BAFO the same day.

The Federal Acquisition Regulation (FAR) states that:

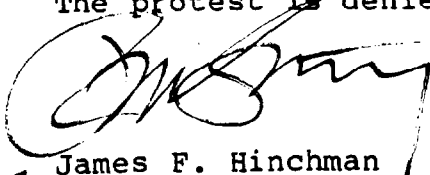

- "(a) Upon completion of discussions, the contracting officer shall issue to all offerors still within the competitive range a request for best and final offers. Oral requests for best and final offers shall be confirmed in writing.
- "(b) The request shall include (1) notice that discussions are concluded; (2) notice that this is the opportunity to submit a best and final offer; (3) a common cutoff date and time that allows a reasonable opportunity for submission of written best and final offers . . . ." FAR § 15.611.

Biltrite's revised BAFO was not late because it was submitted on the same date GSA requested a revised BAFO from Biltrite. However, GSA did not confirm its oral request for the second round of BAFOs in writing nor did the second BAFO request include a common cutoff date and time. GSA, therefore, violated these requirements of the FAR.

GSA's failure to confirm in writing its oral request for the second round of BAFOs is at most a procedural deficiency. The purpose of establishing a common cut-off date in negotiated procurements is to eliminate the danger of premature disclosure of information during the course of the competitive process. CompuServe, B-194286, June 5, 1979, 79-1 CPD ¶ 393. There is nothing in the record to show Biltrite

received notice of Goodrich's prices and Goodrich makes no allegation that the prices in its revised BAFO were disclosed to Biltrite. Although GSA failed to comply with the regulatory requirements here, we find that Goodrich was not prejudiced by GSA's actions.

The protest is denied.

  
 James F. Hinchman  
General Counsel